

Nos. 82-1186, 82-1465

Office - Supreme Court, U.S.  
FILED  
OCT 5 1983  
ALEXANDER L. STEVAS,  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,  
*Petitioner,*

v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,  
and MCGREGOR, SWIRE AIR SERVICES LIMITED,  
*Respondents.*

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,  
and MCGREGOR, SWIRE AIR SERVICES LIMITED,  
*Petitioners,*

v.

TRANS WORLD AIRLINES, INC.,  
*Respondent.*

On Writs Of Certiorari To The United States  
Court Of Appeals For The Second Circuit

**BRIEF OF BOEHRINGER MANNHEIM  
DIAGNOSTICS, INC.  
AMICUS CURIAE**

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## INTEREST OF AMICUS CURIAE

Amicus Curiae Boehringer Mannheim Diagnostics, Inc., formerly known as Hycel, Inc. files this brief with written consent of counsel for Petitioner and counsel for Respondent (copies are attached to the cover letter accompanying this brief). As plaintiff in *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F.Supp. 344 (S.D. Tex. 1981), appeal docketed, No. 81-2519 (5th Cir. Dec. 30, 1981), Boehringer Mannheim Diagnostics, Inc.'s interest is on the side of Respondent Franklin Mint Corporation. The Fifth Circuit Court of Appeals heard argument on the merits in this Amicus' case on March 1, 1983, but by letters of the Chief Deputy Clerk of March 4, 1983, and June 20, 1983, has indicated that it will withhold its decision pending this Court's determination herein.

## QUESTION ADDRESSED

What is the proper conversion factor for the liability limitation set forth in Article 22 (2) of the Warsaw Convention?<sup>1</sup>

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1. All references to the "Warsaw Convention" or to the "Convention" are to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. § 1502 note (1976).

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**BRIEF OF BOEHRINGER MANNHEIM  
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**SUMMARY OF ARGUMENT**

Article 22 of the Warsaw Convention plainly sets forth the limitation in question as 250 65½-milligram pieces of

.900 pure gold, converted into any national currency, per kilogram of goods damaged or lost. The provision of this certain weight of gold as the unit of account of the limitation cannot be judicially annulled or disregarded, for instance by substituting another unit of account such as some fixed number of dollars, francs, or SDR's. The sole issue is what factor to use for conversion of the unit of account into any national currency. The primary error of the court of appeals was in reading the Convention as specifying the official price of gold as the conversion factor.

The plain meaning of the language of Article 22 controls this issue, unless that meaning is inconsistent with the purposes of Article 22. Free-market price is the only factor which truly "converts" the limitation gold sum, that is, changes it for an equivalent value. Further, use of "last official price" of the dollar or the SDR to translate the limitation into \$20.00 or \$21.87 per kilogram is actually a substitution for the certain weight of gold as the unit of account, a fixed number of dollars. Such a substitution is beyond a court's proper function in interpreting a statute.

The purposes of Article 22 were to fix a limitation sum that represented the average value of goods carried, and that would be free of any one nation's control. To focus on the past monetary function of gold misses the point. While the market forces which led to demonitization of gold cause variation in the free-market price of gold, the free-market price still reflects a real valuation of gold while the dollar has suffered inflation in excess of 600% since 1934, and free-market price represents the intended limitation value far better than "last official

price." Further, only free-market price preserves the freedom of the limitation value from any one nation's control.

So much gold converted into national currencies by its price on the free market might or might not be the choice of a limitation of an international conference today. But under proper judicial interpretation the Warsaw Convention so provides. Once the airlines are denied the fiction of "last official price" and required to obey the law, probably then the law will be re-examined by due legislative process.

## ARGUMENT

### **THE CONVERSION OF THE ARTICLE 22 LIMITATION SUM INTO NATIONAL CURRENCIES MUST BE BY REFERENCE TO THE FREE-MARKET PRICE OF GOLD.**

- A. The Liability Limitation set forth in Article 22 of the Warsaw Convention is Defined in Units of So Much Gold per Kilogram, so that the Sole Issue is the Appropriate Factor for Conversion of the Limitation into National Currencies.**

Article 22 of the Convention states in pertinent part:

- (2) In the transportation of . . . goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram . . .

. . .

- (4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½

milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

49 Stat. 3019.

Article 22 plainly defines the limitation sum which is to be converted into national currencies in terms of so much gold per kilogram. *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F.Supp. 833, 843 (E.D.N.Y. 1982), aff'd on other grounds, 705 F.2d 85 (2d Cir. 1983), petition for cert. docketed, No. 83-5 (July 11, 1983). The court of appeals recognized this (690 F.2d at 305, 307), as does TWA (Brief at 22-23). This treaty provision cannot be judicially annulled or disregarded, for instance, by the substitution of SDR's or current francs for gold. *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F.Supp. at 843; see *Sumitomo Shoji America, Inc. v. Avagliano*, 102 S.Ct. 2374, 2377 (1982); see also *Board of Lake County Commissioners v. Rollins*, 130 U.S. 662, 670-674 (1889), and 2A Sands, *Sutherland Statutory Construction* 4-5 (4th Ed. 1973). The court of appeals agreed (690 F.2d at 310-311). The sole issue is what factor to use in converting the gold sums into national currencies.

The court of appeals recognized that the limitation is stated in terms of "a unit of account consisting of '65½ milligrams of gold at a standard fineness of nine hundred thousandths,'" and that "the limit per kilogram is 250 multiplied by the dollar value of 65½ milligrams of gold [.900 pure]." (690 F.2d at 305) (emphasis supplied). However, in the next paragraph of the opinion, the court of appeals confuses this unit of account with a "unit"

(more properly, factor) of conversion, beginning with the statement that "The Convention thus selected [gold's official price] as the unit of *conversion* . . .", followed two sentences later by, ". . . the terms of Article 22 continue to utilize gold as the unit of *conversion*." (690 F.2d at 305) (emphasis supplied). Plainly, Article 22 does not specify a factor for conversion of the limitation sums defined in gold.

The courts of appeals' confusion of gold's official price, an example of a conversion factor, with gold itself, a thing of value, permeates its opinion, leading to the conclusion that when Congress repealed the Par Value Modification Act, it "thus abandoned the unit of conversion specified by the Convention and did not substitute a new one." (690 F.2d at 311). Plainly the law repealing the Par Value Modification Act abolished the official price of gold in this country, and the court of appeals properly rejected "last official price" on this basis (690 F.2d at 309-310). Just as plainly, that law simply does not address the Warsaw Convention's use of so much gold as a unit of account in defining the Article 22 limitation. That law only made unmistakably clear what should have been apparent by 1974 at the latest, that there was an issue as to what was the proper conversion factor for the Article 22 limitation sums defined in gold.

Neither the court of appeals' suggestion that "Other parties may continue to protect themselves through insurance." (690 F.2d at 312), nor TWA's observation that a shipper, by not making a special declaration of value, chooses to insure itself (Brief, p. 3, ftn. 6), adds anything toward resolving this issue. The issue remains, what conversion factor determines the limitation value above

which such a shipper must self-insure? TWA assumes such a shipper accepts the \$9.07 per pound limitation set forth in its tariff. But that, too, is circular, since if the \$9.07 per pound limitation is less than that which is laid down in Article 22, any such tariff provision is null and void. Warsaw Convention Art. 23. *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F.Supp. 334, 349 (S.D. Texas 1981). So also is CAB Order 74-1-16 on which any such tariff is based. Point E., *infra*.

**B. The Conversion Factor is Determined By the Plain Meaning of the Language of Article 22 Unless that Meaning is Inconsistent With the Purpose of Article 22.**

This Court recently addressed this issue in the context of interpreting another treaty:

Interpretation of the Friendship, Commerce, and Navigation Treaty between Japan and the United States must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Maximov v. United States*, 373 U.S. 49, 54 (1963). See also *The Amiabile Isabella*, 6 Wheat. 1, 72 (1821).

*Sumitomo Shoji America, Inc. v. Avagliano*, 102 S.Ct. 2374, 2377 (1982). The Court found that the pertinent language of Article XXII(3) of the Treaty ("Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their judicial status

recognized within the territories of the other Party.”) clearly meant that a Japanese subsidiary incorporated in New York was a company of the United States and so could not invoke rights under the Treaty of a company of Japan operating in the United States. 102 S.Ct. at 2378-2379. Finding that both treaty parties’ responsible agencies currently and expressly attributed this same meaning to the Treaty, 102 S.Ct. at 2379, and finding its purpose consistent with its clear meaning, 102 S.Ct. at 2380-2382, the Court concluded:

We are persuaded, as both signatories agree, that under the literal language of Article XXII(3) of the Treaty, Sumitomo is a company of the United States; we discern no reason to depart from the plain meaning of the Treaty language . . .

102 S.Ct. at 2382. Aside from the agreement of the signatories which is not a factor here, the approach of the Court was to treat the plain meaning of treaty language as controlling of the interpretation of the treaty, unless that meaning is shown to be inconsistent with the purpose of the treaty.

#### **C. The Plain Meaning of the Language of Article 22 is Conversion By Use of the Free-Market Price.**

The key word, “convert”, in its relevant usage is most often defined to mean an exchange of equivalents: “convert . . . v . . . 15. To change by substitution of something of equivalent value . . .”, *THE OXFORD ENGLISH DICTIONARY* (Compact Ed., Oxford University Press, 1971); “convert . . . vt . . . 2 . . . c: to exchange for a specified equivalent (stock holdings into cash) . . .”, and “conversion table n: a table of equivalents for changing units of

measure or weight into other units", WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE—UNABRIDGED (1961); *convert* . . . vt . . . 2 . . . c: to exchange for an equivalent . . ." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1971).

Conversion of the gold limits by the free-market price of gold in any national currency at least approximates an equivalent value, while use of "last official price" in dollars or SDR's, or substitution of the current franc, results in an entirely unrelated real value. See Point D.2.a., *infra*. Writing in 1974, Mr. Paul P. Heller, having concluded that "the Bretton Woods system has collapsed," recognized that:

In the circumstances, the only available fair and equitable valuation of gold can be obtained by accepting its price on the free market.

Heller, *The Value of the Gold Franc—A Different Point of View*, 6 J. Mar. L. & Com. 73, 96 (1974) (hereinafter "Heller").

Consideration of the key word, "convert", in its context is even more instructive. Article 22 does two things: it defines the limitations in units of a certain amount of gold, Point A., *supra*; and it provides for conversion of those gold units into national currencies. It does not provide for a substitution of any other unit of account for the certain amount of gold, and such a substitution would be beyond a court's proper function in interpreting a treaty or statute. The court in *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, rejected the airlines' suggestion of using current French francs or SDR's to calculate the limitations on just this basis, 535 F.Supp.

at 843, as did the district court (525 F.Supp. at 1289) and the court of appeals (690 F.2d at 310-311).

For precisely the same reason, use of "last official price" would be equally improper. "Last official price" is a fiction. It is a fiction because it is purported to be a factor for conversion of the limitations drafted in terms of gold, but it is in fact a one-time substitution at an artificial rate of the dollar for gold as the unit of account. Under this substitution, in the United States the Article 22 limitation per kilogram of damaged goods would be twenty U. S. dollars, the same as if Article 22(2) were rewritten so to specify.

In what appears to be the germinal article for the idea of "last official price," that idea was treated as the fiction it is. Writing in July 1974, Mr. T. C. M. Asser, addressing the problem of determining official gold values of floating currencies, concluded "There appears to be no logical solution". Asser, *The Value of the Gold Franc—A Different Point of View*, 5 J. Mar. L. & Com. 645, 666 (1974) (hereinafter "Asser"). It was only then, and by way of "an illogical assumption," that Mr. Asser suggested "last official price". Asser, *supra*, at 666. As discussed further in Point D.2.a., *infra*, Mr. Asser immediately rejected his own suggestion of "last official price." Asser, *supra*, at 666-667.

There simply is no difference in the substitution of the dollar by the fiction of "last official price" and the substitution of the SDR rejected by the court in *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, *supra*, 535 F.Supp. at 843, as well as by the district court (525 F.Supp. at 1289) and the court of appeals (690 F.2d at 310-311). Since SDR's lost their gold base on April 1, 1978 along with the dollar and all other IMF

currencies, Martin, *The Price of Gold and the Warsaw Convention*, 4 Air.L. 70, 71 (1979) (hereinafter "Martin"), it would be necessary to use the "last official price" of SDR's or some other arbitrary factor to calculate the limitation. The court of appeals expressly recognized this necessity of setting the level of the limitation were SDR's to be substituted for gold (690 F.2d at 310). TWA does also, although it simply assumes the "last official price" of the SDR would be used (Brief at 34-35).

Only conversion by the free-market price fits the language of Article 22 according to its plain meaning. Free-market price should be used for the conversion unless to do so would be inconsistent with the purposes of Article 22. See *Sumitomo Shoji America, Inc. v. Avagliano*, 102 S.Ct. at 2377.

**D. The Purposes of Article 22 as Reflected in the Records of Deliberations of the Delegates to the Convention Compel Use of the Free-Market Price.**

**1. The Delegates Intended to Fix a Limitation Sum that Would Represent the Average Value of Goods Carried, and that had an International Value, Free of any One Nation's Control.**

TWA correctly states that the Convention delegates' deliberations "clearly provide a basis for ascertaining the treaty's purposes and intents." (Brief at 7, n.13). A review of the delegates' remarks in their full context leads to several pertinent conclusions. First, the delegates intended the limitation value to represent the average value of goods carried. This objective was raised by Mr. Ripert and confirmed by Mr. Richter and Mr. Pittard early on

(JA [Joint Appendix] 160-161), and was never questioned. *Second International Conference on Private Aeronautical Law, Minutes* 88-91 (R. Homer D. Legrez trans. 1975) (JA 158-165). The court of appeals alluded to this objective: "Since use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value. . . ." (690 F.2d at 309).

Secondly, the delegates intended the limitation value to be an international value, free from control by any one member nation's laws. In the only real confrontation of the deliberation, Mr. Pittard overcame Mr. Ripert's proposal of specifying simply the French franc, or even the U. S. dollar, even though they were currently valued against gold, without expressly basing the limitation on gold, an "international value." (JA 161-164). The court of appeals recognized this (690 F.2d at 307), as does TWA (Brief at 6-7), and as did the court in *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F.Supp. at 842, 843 n.9.

Thirdly, the limitation was expressed in terms of gold because gold served the above two objectives. Gold was recognized as having a stable real value so that the average value of goods carried could be reliably expressed in terms of gold. Mr. Sudre, The Secretary General, referred to that gold value when he stated regarding the limitation sum: "You have just indicated that you would accept the value of the present stabilized French franc for its gold value . . ." (JA 164). And, as Mr. Pittard stated, the value of gold was ". . . the same in all countries, since there is but one quality of gold . . . an international value." (JA 161). Hence gold was chosen because it tended to reflect a stable real value, and it had an international value free of any one nation's control. See Heller,

*supra*, at 94-95; Asser, *supra*, at 664; and Martin, *supra*, at 71.

Fourthly, there is no evidence whatsoever in the deliberations that "the framers clearly contemplated use of the governmentally fixed price of gold in adopting it as a unit of account . . ." as stated by the court of appeals (690 F.2d at 310). Even though there had recently been "a stabilization which was done in practically every country" (Mr. Ripert) (JA 162), the expressed concern was that even a stabilized currency such as the new franc could be revalued, or even taken off the gold standard, by new national legislation (Mr. Clarke, as well as Mr. Pittard) (JA 161-163). Mr. Pittard therefore urged the use of gold, which had an international value, on whatever basis, and whether or not, any particular nation valued its currency against it (JA 161-164). The most that can be concluded from Mr. Pittard's remarks, and the deliberations generally, is that the delegates chose to specify the limitation value in gold for the same reasons that Switzerland and other nations preferred to specify their currencies in gold: gold tended to reflect a stable real value, and its value was independent of any one nation's control.

But even if the court of appeal's assertion were true, that gold's monetary function was the reason it was chosen as the limitation standard, the later demonitization of gold would not automatically rule out free-market price as the court of appeals concludes (690 F.2d at 310). The demonitization of gold still would be only a factor in the interpretation of Article 22 in light of today's circumstances. "Conditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional

clock as forever stopped in 1787." *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 425 U.S. 890 (1976). The delegates probably didn't foresee demonitization of gold, but they probably didn't foresee inflation in excess of 600% either. "But it is no bar to interpreting a statute as applicable that 'the question which is raised on the statute never occurred to the legislature'. Cardozo, *Nature of Judicial Process*, 15 (1921)." *Eastern Air Lines, Inc. v. C. A. B.*, 354 F.2d 507, 511 (D.C. Cir. 1965). To speak of "monetary gold" of old versus the present "commodity gold", e.g., *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, *supra*, 535 F.Supp. at 842-843, misfocuses the issue. The issue is, does conversion of the limitation sum by the free-market price, or substitution of \$9.07/pound or some other fixed dollar figure as the limitation, better effectuate in today's circumstances the delegates' intent that the limitation sum represent the average value of goods carried, and have an international value, free of any one nation's control?

**2. Conversion of the Gold-Based Limitation at the Free-Market Price Effectuates the Intent of the Delegates Better Than Substitution of the Dollar at the Last Official Price.**

**a. Conversion at the free-market price represents the average value of goods carried better than substitution at the last official price.**

Whether one considers that the average value of goods carried today remains equal to the real value of the limitation in 1934, or considers that there has been an increase in the average value of goods per unit of weight

due primarily to advances in and miniaturization of electronics, conversion at the free-market price preserves the drafters' intent to set the limitation at the average value of goods carried better than substitution at "last official price". Assuming a free-market price of \$400 per ounce in 1980, at that time use of the free-market price over-valued the 1934 limitation value by a factor of less than two. In 1934, the limitation for goods of a certain weight would be so much gold worth 35 1934 dollars per ounce. Heller, *supra*, at 93. In 1980, per assumption the same amount of gold would be worth 400 1980 dollars per ounce. One 1934 dollar is worth six 1980 dollars in real purchasing power. Bureau of Consumer Protection, Civil Aeronautics Board, Memorandum on Warsaw Convention Limits (JA 42), at 4. Hence the value of the limitation in 1980 compared to its value in 1934 is 400 compared to 35, but also 1 compared to 6, or, overall,  $1\text{-}9/10$  to 1 ( $400/35 \times 1/6 = 1\text{-}9/10$ ). On the other hand, substitution of the dollar at the "last official price", \$42.22 per ounce, under-values the 1934 valuation by a factor of five. Once again, the value of the limitation in 1934 is so much gold at 35 1934 dollars per ounce. But now the same gold in 1980 is to be worth 42.22 1980 dollars per ounce. The 1934 dollar is still worth six 1980 dollars. Now the value of the limitation in 1980 compared to its value in 1934 is 42.22 compared to 35, but also 1 compared to 6, or, overall,  $1/5$  to 1 ( $42.22/35 \times 1/6 = 1/5$ ). Gold at the free-market price has maintained its tendency to reflect real values far better than has the dollar. See Heller, *supra*, at 93-95. Writing in October 1974, Mr. Heller concludes: "The increased price of gold on the free market is more in line with the upward movement of cost of living and cost of labor than the increase of the "official" value of gold over the past

forty years from US\$35 to US\$42.222222. . . ." Heller, *supra*, at 95.

The court of appeals considered only that the price of gold on the free market was "the daily fluctuating price of a commodity" in rejecting conversion at the free-market price (690 F.2d at 310). Thus the court of appeals focused on only one factor, day-to-day stability, in rejecting free-market price. However, since July, 1974, at the latest there has been "no logical solution" to the problem of maintaining *day-to-day* stability under a standard defined in gold in a world of floating currencies with either free-market price or official price. Asser, *supra*, at 664-666. Mr. Asser proposed two solutions by way of "an illogical assumption": use of "last official price" and use of non-gold based SDR's. Asser, *supra*, at 666. But he quickly rejected "last official price" because "it does nothing to rectify the fact that fluctuations in the exchange rate between the two currencies lead to immediate and corresponding fluctuations in the 'official' gold price of the first currency." Instead, he urged the use of the basket of currencies approach of the SDR. Asser, *supra*, at 666-667. He recommended that "[w]hen the SDR is pegged to a basket of currencies, the simplest solution would be to replace the gold franc with a certain quantity of SDR's". Asser, *supra*, at 668. The unacceptability to an American court of replacement of the gold amounts by a quantity of SDR's is discussed in Point A., *supra*. However Mr. Asser correctly pinpoints the cause of lack of stability using "last official price", namely "fluctuations in the exchange rate between the two currencies", and rejects it for that reason. Mr. Asser's observation, made in July 1974, was confirmed more recently in the May 23, 1983 Newsweek in an article

titled, "A Return to Bretton Woods?" (reproduced in the Appendix hereto at A-1). While these same exchange rate fluctuations will be encountered in expressing the free-market price of gold into many nations' currencies, the point remains that the claim of day-to-day stability of "last official price" is substantially illusory.

Furthermore, even daily fluctuations in the market price of gold need not be a serious problem. Communications science has far exceeded the requirements of this situation. The London market is the world's primary gold market, and airlines can obtain the London fixes just as CBS news does. And as previously stated by the Fifth Circuit Court of Appeals:

The contract plays a role fundamental to the objectives of the Warsaw Conference. The obligations arising from the contract between the carrier and the passenger carry out the conference goal that the rules of limited liability be known to both parties . . .

*Block v. Compagnie Nationale Air France*, 386 F.2d 323, 333-334 (1967), *cert. denied* 392 U.S. 905 (1968). Hence the latest London fix at the time the air waybill for the carriage in question is issued should determine the limitation.<sup>2</sup> Each airline can continually update a computer memory with the current limitation value, and cargo rate information calculated therefrom, just as air-

2. For example, assuming a London fix at \$412.00 per troy ounce, where 1 gram = 0.03215 troy ounce and 1 kilogram = 2.2 pounds:  
 Limitation per kilogram = (250) (65½ milligrams) (0.900)  
                                       = 14737.50 milligrams of gold  
                                       = .4738 troy ounces of gold  
 Dollar limitation per kilo = \$195.21  
 Dollar limitation per pound = \$195.21 ÷ 2.2 = \$88.73  
 [Approximate check: (\$412.00 ÷ \$42.22) (\$9.07) = \$88.51]

lines currently do with reservation, fare, and flight schedule information. The airline can then call up on its computer terminals what rates to charge for carriage of undeclared value goods.

Most importantly, despite the overwhelming emphasis placed by the court of appeals and TWA on fluctuations in the day-to-day price of gold on the free market, the express desire of the delegates was that the limitation sum represent the average value of goods carried. Significantly, that intent of the delegates is not even mentioned by TWA, and while the court of appeals specifically mentioned the desire of the delegates to "... establish a limitation level at a certain value ..." in rejecting "last official price" (690 F.2d at 309), that court did not mention that desire in examining free market price. Even with its greater day-to-day variations, free-market price serves this intent of the delegates far better than "last official price."

**b. Only conversion at the free-market price preserves an international value, free from any one nation's control.**

Neither the court of appeals nor TWA suggests that gold has become any less the international value urged by Mr. Pittard. Gold at the free-market price still is a value determined by international factors, free from control by any one nation.<sup>3</sup> The point, clearly made by Mr. Pittard, seconded by Mr. Clarke, and ultimately accepted by the delegates, was to avoid using any national currency to define the limitation (JA 161-164), since then "... it's

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3. The price of gold on the London market is fixed twice daily by representatives of the world's five largest traders at the price that will result in the largest volume of trading.

your national law which determines it, and one need only have a modification of the national law to overturn the essence of this provision." (JA 162).

If, on the other hand, the gold-based limitation were to be changed over to 9.07 U.S. dollars per pound, or any other dollar amount, the value of the limitation would be at the control of the United States. Even if the dollar is considered relatively stable on a day-to-day basis, as Mr. Pittard stated: "But the fact that a currency has been stabilized does not imply that it is a final thing; a law can always modify another law." (JA 161). What the delegates to the Convention expressly ruled out was the ability of any one nation to control the limitation value. Conversion by free-market price preserves that objective. Substitution of the dollar at "last official price" or any other arbitrary setting of a dollar limitation, directly contradicts it.

#### **E. CAB Order 74-1-16 Does Not Justify Use of "Last Official Price" for the Article 22 Conversion.**

In December 1971, as part of the Smithsonian Agreement, the U. S. dollar along with several other currencies were to be revalued. Asser, *supra*, at 651. Effective May 8, 1972, the U. S. official price was formally raised from \$35 to \$38 an ounce. Heller, *The Warsaw Convention and the "Two-Tier" Gold Market*, 7 J. World Trade L. 126, 127 (1973). By order adopted June 2, 1972, the Civil Aeronautics Board ordered the airlines to revise their tariffs to reflect the new official price, "... to accurately express the minimum liability limitations allowed by the Convention . . ." CAB order 72-6-7, 37 Fed. Reg.

11 (1972). Again in February 1973, the United States decided to further devalue the dollar. Heller, *supra*, at 85. As of October 18, 1973, the U. S. official price was formally raised to \$42.22 an ounce, and by order adopted January 3, 1974, the CAB again ordered airlines to revise their tariffs to reflect the new official price, since "... the minimum liability limits specified in Order 72-6-7 and the tariffs currently on file with the Board no longer meet the minimum liability limits of the Convention . . ." CAB Order 74-1-16, 39 Fed. Reg. 1526 (1974) (JA 54).

TWA erroneously places great weight on CAB Order 74-1-16 (Brief at 28-29). As late as 1973, in some official transactions gold was still being converted into currencies at par values or central rates based on U. S. \$42.22 an ounce. Heller, *supra*, at 89. Further, CAB Orders 72-6-7 and 74-1-16 served, as the CAB expressly declared was necessary, to assure that the gold sums of Article 22 were being converted on the basis of a current price. Hence at least the language of Article 22 wasn't clearly offended by these CAB orders. The situation changed entirely beginning in early 1974. Not long after CAB Order 74-1-16 was adopted, "official price" ceased to have any real function, Heller, *supra* at 87-91, Asser, *supra*, at 652, 665, and by Act of October 19, 1976, Pub.L. No. 94-564, 90 Stat. 2660 (1960), the statute which established the official price on which CAB Order 74-1-16 was based was repealed, and the concept of official price formally abolished, effective April 1, 1978. Martin, *supra*, at 70-71. Continued usage of "last official price" after April 1, 1978 clearly offends the language of Article 22. Point C., *supra*. Nothing in CAB Order 74-1-16 supports use of "last official price" after April 1, 1978, or even use of official price after early 1974. The court of appeals agreed

regarding the district court's reliance on Order 74-1-16 after April 1, 1978 (690 F.2d at 309-310).

Moreover, questions of interpretation of provisions of the Warsaw Convention are not matters within the CAB's primary jurisdiction. As stated in *United States v. Decker*, 600 F.2d 733, 737 (9th Cir. 1979): "It is the role of the judiciary to interpret international treaties and to enforce domestic rights arising from them." No CAB action could itself dictate the construction of Article 22. Furthermore, any CAB order or application thereof which is contrary to Article 22 properly construed is void. Warsaw Convention, Article 23; see *Brady v. Roosevelt Steamship Company*, 317 U.S. 575, 582-584 (1943), and *Reed v. Wiser*, 414 F.Supp. 863, 869, n.21 (S.D.N.Y. 1976), rev'd on other grounds, 555 F.2d 1079 (2nd Cir. 1979). Nor does the airlines' continued adherence to Order 74-1-16 after April 1, 1978, lend "last official price" any legitimacy as the court of appeals concluded (690 F.2d at 312), at least in cases such as this *Amicus*', in which the air waybill in question was dated after April 1, 1978, specifically June 27, 1978, *Boehringer Mannheim Diagnostics, Inc., f/k/a Hycel, Inc. v. Pan American World Airways, Inc.*, *supra*, 531 F.Supp. at 346, and in which the instant issue is still pending decision. In such cases, while the airlines "have relied on the last official price of gold" (690 F.2d at 311), plainly the plaintiffs have disputed that reliance. The Warsaw Convention's ". . . evident purpose is to protect shippers as well as carriers." *Leon Bernstein, Etc. v. Pan American World Airways*, 421 N.Y.S.2d 587, 588 (App. Div. 1979). Moreover, the airlines have since 1973 been on notice of this issue, *Heller, The Warsaw Convention and the "Two-Tier" Gold Market*, 7 J. World Trade L. 126, 129 (1973), and since

April 1, 1978, in the court of appeals' terms, "The case for continuing to use the now repealed price of gold thus finds no support in law or logic." (690 F.2d at 309).

Finally, this issue was put in proper perspective in 1979:

In the United States it is believed that no change is at present contemplated in the method of calculation used in CAB Order 74-1-16 where the former United States 'official' price of gold of U. S. \$42.22 per fine ounce is used as the base: however, it is plain that this Order, which is purely administrative, is not likely to be upheld as declaratory of the law if the matter of conversion were to come before the courts of the United States. I sometimes think that the collapse of the present 'official' price/SDR system will begin in a low value cargo claim litigated in a New York night court!

Martin, *supra*, at 75.

**F. The Foreign and Domestic Decisions on the Issue Do Not Justify Use of "Last Official Price" for the Article 22 Conversion: A Summary.**

The Honorable Walter Ely, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, who sat by designation in *Boehringer Mannheim Diagnostics, Inc., f/k/a Hycel, Inc. v. Pan American World Airways, Inc.*, 531 F.Supp. 344 (S.D. Tex. 1981), appeal docketed, No. 81-2519 (5th Cir. Dec. 30, 1981), observed: "The handful of foreign tribunals that have addressed the issue have not been uniform in result." (footnote deleted). 531 F.Supp. at 352. The disarray of these decisions together with the failure of the Montreal Protocols to gain approval in this country lead only to the conclusion that

a new and more fair-minded international conference is needed. Yet TWA asserts that the foreign decisions holding for "last official price" "are entitled to considerable weight" (Brief at 22, ftn. 28), but that the foreign decisions holding for the free-market price lend "scant support" thereto because, with the exception of one case later overruled by statute, these cases "predate the dramatic fluctuations which began in 1979" (Brief at 25, ftn. 32 continuation).

Hence TWA argues that "the dramatic fluctuations which began in 1979" are alone sufficient reason judicially to alter the Article 22 limitation per kilogram from 250 gold pieces to 20 U. S. dollars. Accordingly TWA asserts only the spectre of a "widely fluctuating limit of liability" in arguing rejection of free-market price (Brief at 23). In *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, the court focused on only this one factor, day-to-day stability, in rejecting free-market price. 535 F.Supp. at 842-843. In the three other domestic decisions relied on by TWA (Brief at 24-37), *Deere & Co. v. Deutsche Lufthansa A. G.*, No. 81 C 4726 (N.D. Ill. Dec. 30, 1982) simply followed *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*; *Maschinenfabrik Kern, A. G. v. Northwest Airlines, Inc.*, 562 F.Supp. 232, 239 (N.D. Ill. 1983), simply followed CAB Order 74-1-16; and *Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc.*, No. 784512 (Cal. Super. Ct., San Francisco, Aug. 25, 1982) states only an unsupported conclusion. Finally, as pointed out above (Point D.2.a.), the court of appeals rejected free-market price solely on the basis of its "daily fluctuating price" (690 F.2d at 310).

In summary, the courts holding in favor of the various airlines reject free-market price for "last official price" simply because of the deceptively appearing constancy of a fixed number of dollars. And the airlines urge the \$9.07 per pound limitation because, being less than one-fifth the value intended by the Convention delegates, it is to them a most favorable fiction. But the question here is not what unit of account a present-day international conference on private aeronautical law would choose to specify the liability limitation, or at what real value such a conference would set the limitation. As long as the Warsaw Convention is law, the limitation per kilogram is so much gold. Point A., *supra*. The only available, and proper, factor for converting the gold sums into national currencies, which factor is consistent with both the plain meaning and the purposes of Article 22, is the price of gold on the free market. Points B.-D., *supra*. It may or may not be true that Article 22's gold-based limitation is out-dated. See "A Return to Bretton Woods?" (A-1). But only when the airline industry is required to obey the law properly interpreted will it act to bring about a re-examination of that law by the due legislative process. While the courts of civil law signatories to the Convention may assume that legislative function, in the United States that function resides solely in the United States Senate. United States Constitution, Article 2, Section 2, Clause 2.

### CONCLUSION

The Judgments of the United States Court of Appeals for the Second Circuit and of the United States District Court for the Southern District of New York should be reversed. The free-market price of gold, according to

the latest London fix at the time the air waybill in question is issued, should be held to be the proper conversion factor for the liability limitation laid down in Article 22, paragraphs (2) and (4), of the Warsaw Convention. This holding should be retroactive to at least pending actions involving air waybills issued after April 1, 1978. Accordingly this cause should be remanded to the United States District Court for the Southern District of New York for further proceedings in accordance with this holding.

Dated: Houston, Texas

October \_\_\_\_\_, 1983

Respectfully submitted,

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# A Return to Bretton Woods?

There was some irony last week in French President François Mitterrand's call for more stable international exchange rates, for it was France as much as any other nation that was responsible for the demise of the Bretton Woods Agreement, the world's last fixed-rate currency regime. When initiated in 1944, the agreement explicitly designated the U.S. dollar as the most important currency in the world. It was declared to be worth one thirty-fifth of an ounce of gold, and other major currencies would be pegged to it. While it lasted, Bretton Woods maintained the dollar as a reasonably stable international standard and greatly facilitated the explosive growth of postwar trade.

But Bretton Woods was destined not to last. The \$35-an-ounce gold price kept the dollar artificially strong, despite erosion of its purchasing power through domestic inflation and growing economic strength among America's major trading partners. With the dollar increasingly overvalued, the United States began running persistent trade deficits. And as excess dollars started to accumulate abroad, the French government began trading them in for gold. By 1971 the situation was getting out of hand, and as growing numbers of private speculators joined the bear raid, President Richard Nixon abruptly announced that the United States was no longer in the business of selling gold.

In the wake of the violent currency storms that subsequently swept the world, many international-finance experts have grown nostalgic for the good old days of Bretton Woods. But unlike Mitterrand, few believe that fixed exchange rates can soon be restored. U.S. Treasury Secretary Donald Regan says,

for example, that in 1979 former French President Valéry Giscard d'Estaing co-sponsored a European Monetary System in which eight key currencies are linked in a loosely fluctuating band. Since then, he says, the EMS, more commonly called the snake, has had to be readjusted seven times, "and those are fixed rates among nations who think alike and supposedly have similar economies. If they can't have something that works on fixed rates, how the hell can we do it worldwide?"

Goldbugs Still, a small group of American economists is attempting to persuade the government to repeg the dollar to the price of gold. Supply-side guru Arthur Laffer, for example, supports a plan in which the government announces that it will return to a gold standard three months hence and then refuses to intervene in the foreign-exchange markets or tinker with the domestic money supply. Within that time, he argues, the free market will have settled on a sustainable price for gold. From that point on, Laffer insists, the Federal Reserve Board will be forced to run a more responsible monetary policy: whenever the nation's gold stocks begin to dwindle, the Fed will be forced to tighten money to counteract an incipient inflation, and whenever people begin exchanging gold for currency, it is time for the Fed to loosen up.

While such a mechanism may be useful domestically, it will not prevent foreign-currency fluctuations caused by other governments with contrary economic policies. Currency stability cannot be created until governments learn to coordinate economic planning, and as the French example reveals, that day seems increasingly remote.

Christopher Burnich—Newsweek

